NO. 33524

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

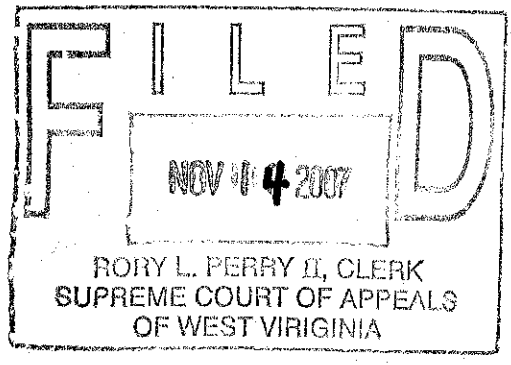
**ELIZABETH A. SEDLOCK, et al.,**

**Plaintiffs - Appellants,**

**v.**

**THOMAS MOYLE, et al.,**

**Defendants - Appellees.**




# BRIEF OF APPELLEES

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## I. INTRODUCTION

Appellees Marsha Ann Felton, Jean Hollandsworth and Double H. Realty, Inc. submit this Brief of Appellees. The Circuit Court of Harrison County properly dismissed the claims in the complaint filed by Appellees Elizabeth A. Sedlock and Jason Banish against Ms. Felton, Ms. Hollandsworth and Double H. Realty pursuant to West Virginia Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Appellants can prove no set of facts in support of their claims against Ms. Felton, Ms. Hollandsworth and Double H Realty for breach of contract, negligence and fraud, which would entitle them to relief.

Manifestly, the claims against Ms. Felton, Ms. Hollandsworth and Double H Realty do not meet the pleading requirements of the West Virginia Rules of Civil Procedure. The complaint does not contain a "short and plain statement of the claim" showing that Appellants are entitled to relief as required by West Virginia Rule of Civil Procedure 8. In addition, the claim for fraud is not pled with particularity as required by West Virginia Rule of Civil Procedure 9(b).

The circuit court properly weeded out Appellants' unfounded claims, which arise in connection with the events surrounding the sale of Sedlock's property at 601 Indiana Avenue, Nutter Fort, WV 26301. The circuit court correctly held as a matter of law that there is no duty placed on a real estate salesperson to anticipate a breach of contract and to protect a buyer and/or seller from such breach. In addition, West Virginia Code Section 30-40-26(f) does not require a real estate salesperson to place any requested terms or conditions in a real estate contract. Moreover, the parties to a real estate contract have a duty to read the contract and know its contents before signing.

For all of these reasons, this Court should affirm the order of the circuit court, which granted the motion to dismiss filed by Ms. Felton, Ms. Hollandsworth and Double H. Realty.

## II. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Appellants initiated this action by filing a complaint against Ms. Felton, Ms. Hollandsworth, Double H. Realty and David A. Romano and Cathy Joey Romano in the Circuit Court of Harrison County on August 18, 2006.[1] The complaint contains claims against Ms. Felton, Ms. Hollandsworth and Double H. Realty for breach of contract and negligence. The complaint also contains a claim against Ms. Felton for fraud. In addition, the complaint contains separate claims for breach of contract and fraud against the Romanos. The complaint demands compensatory and punitive damages.

On September 15, 2006, Ms. Felton, Ms. Hollandsworth, and Double H. Realty moved the circuit court to dismiss the complaint pursuant to West Virginia Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The parties fully briefed the motion.

In an order entered on October 24, 2006, the circuit court granted Ms. Felton, Ms. Hollandsworth and Double H. Realty's Motion to Dismiss. The circuit court held as a matter of law that Ms. Felton, Ms. Hollandsworth and Double H. Realty did not breach any duty owed to Plaintiffs because there is no duty placed on a real estate salesperson to anticipate a breach of contract and to protect a buyer and/or seller from such breach. Further, the circuit court held that West Virginia Code Section 30-40-26(f) does not require a real estate salesperson to place any requested terms or conditions in a real estate contract, regardless of how impossible or impractical that term or condition may be. The circuit court also found that parties to a real estate contract have a duty to read the contract and know what is contained in it before signing.

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[1] Thomas Moyle and Joann Moyle were also listed in the caption of the complaint. There is, however, no claim stated against the Moyles and they were never served with process. Appellants concede that the Moyles' names were erroneously left on the complaint. Br. of Appellants at 1.

Because the order did not dispose of the claims against the Romanos, the circuit court certified the order pursuant to West Virginia Rule of Civil Procedure 54(b).[2]

On February 23, 2007, Appellants filed a petition for appeal in the circuit court. Ms. Felton, Ms. Hollandsworth and Double H. Realty submitted their response to the petition for appeal to this Court on March 20, 2007.

On May 14, 2007, Appellants filed a motion with this Court to stay proceedings in the circuit court. Ms. Felton, Ms. Hollandsworth and Double H. Realty responded to the motion on May 18, 2007. Thereafter, on May 30, 2007, Appellants filed a second motion with this Court to stay proceedings in the circuit court. Then, on June 4, 2007 Appellants requested this Court withdraw their motion for stay, which this Court did by order entered on June 7, 2007.

On July 26, 2007, Appellants filed a motion to amend the complaint in this Court. On that same day, Appellants also filed a motion to supplement the record in this Court. Ms. Felton, Ms. Hollandsworth and Double H. Realty responded to both motions on August 15, 2007.

Following oral presentation on September 12, 2007, this Court granted the petition for appeal.

By Order entered on October 27, 2007 this Court denied Appellants' motion to amend the complaint.

The motion to supplement the record is still pending.

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[2] Subsequently, however, Appellants resolved their dispute with the Romanos in mediation held on June 1, 2007. The circuit court entered an order dismissing Appellants claims against the Romanos on June 21, 2007. No further action is pending in the Circuit Court of Harrison County. Accordingly, the circuit court entered final judgment in this action on June 21, 2007.

## III. STATEMENT OF FACTS

Ms. Felton is a West Virginia licensed real estate salesperson and, at the time, Ms. Hollandsworth was a licensed West Virginia broker and an officer in the corporation Double H. Realty. Double H. Realty retained Ms. Felton as a real estate salesperson. Plaintiffs' Complaint ¶ 1-2.

On February 18, 2004, Ms. Felton obtained a six month exclusive listing agreement from Sedlock for 601 Indiana Avenue, Nutter Fort, WV 26301. *Id.* at ¶ 3. Under this agreement, Ms. Felton showed the Indiana Avenue house to the Moyles. *Id.* at ¶ 5. On March 29, 2004, Ms. Felton drafted a "Contract for Sale and Purchase" for the sale of Sedlock's Indiana Avenue house to the Moyles. *Id.* at ¶ 6-7. Included in this contract was a clause making the performance of the contract "contingent upon the seller locating acceptable housing . . . ." *Id.* Sedlock and Mr. Banish did not enter into a contract to purchase a house until June 26, 2004. *Id.* at ¶ 14. The contract between Sedlock and the Moyles had expired. *Id.* at ¶ 6, 8.

On June 26, 2004, Ms. Felton drafted a "Contract for Sale and Purchase" for the sale of 339 Worley Avenue, Clarksburg, WV 26301 by the Romano to Elizabeth A. Sedlock and Jason Banish. On that same day, Ms. Felton contacted the Moyles to determine if they were still interested in purchasing Sedlock's home. *Id.* at ¶ 13. Despite potentially losing earnest money for another house they had made an offer to purchase, the Moyles stated that they were still interested in purchasing Sedlock's home. *Id. Id.* at ¶ 14. Ms. Felton drafted the "Contract for Sale and Purchase" of Sedlock's house on Indiana Avenue to the Moyles for Sedlock's approval. *Id.* at ¶ 20. The clause making the sale of Sedlock's home "contingent upon the seller locating acceptable housing . . . " was not included because acceptable housing had been located. Sedlock read the contract, accepted the

contract as drafted and executed the contract on July 5, 2004. *Id.* at ¶ 20 (*See* Ex. 8, which was incorporated into the Complaint by reference, as if it had been fully set forth). The Moyles signed the July 5, 2004 contract.

On or about August 17, 2004, Marsha Ann Felton informed Sedlock that David Romano had left a voicemail message for Beth Taylor ("Ms. Taylor"), the Romanos real estate salesperson, that he was not going to sell his home. *Id.* at ¶ 37. On or about August 19, 2004, the Romanos officially notified Ms. Taylor by letter signed by their attorney Robert L. Greer that they would not sell their house to Appellants as was provided for in the June 26, 2004 contract. Following notification of the Romanos' breach, Sedlock, rather than enforce the contract she had entered into with Mr. Banish for the purchase of the Romanos' house, expressed a desire to maintain her house on Indiana Avenue. *Id.* at ¶ 19 . However, the Moyles enforced the contract requiring Sedlock to sell her house. *Id.* at ¶ 44. Sedlock and Mr. Banish then filed a lawsuit in the Circuit Court of Harrison County.

Appellants attempt to embellish their claims against Ms. Felton, Ms. Hollandsworth and Double H. Realty by referring to matters outside the appropriate record. *See* Brief of Appellant 2-3; 20-21. These matters include a proposed paragraph 13.1, for which they sought leave from this Court to include in an amended complaint. In an October 24, 2007, ruling, this Court refused Appellants motion to amend their complaint. Accordingly, this Court must strike and disregard the discussion of this matter, which is contained on portions of pages 2 through 3 and 20 through 21 of their brief. Appellants also cite to the deposition of Thomas Moyle, which was not a part of the circuit court's record when it made its decision to grant Ms. Felton, Ms. Hollandsworth and Double H. Realty's motion to dismiss. Accordingly, this Court should strike and disregard the discussion of this matter, which is contained on portions of pages 2 through 3 and 20 through 21.

## IV. STATEMENT OF THE ISSUE

Whether the Circuit Court of Harrison County properly dismissed the complaint against Marsha Ann Felton, Jean Hollandsworth and Double H. Realty, Inc. pursuant to West Virginia Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted because there is no duty placed on a real estate salesperson to anticipate a breach of contract and to protect a buyer and/or seller from such breach, because West Virginia Code Section 30-40-26(f) does not require a real estate salesperson to place any requested terms or conditions in a real estate contract and because the parties to a real estate contract have a duty to read the contract and know its contents before signing.

## V. STANDARD OF DECISION AND REVIEW

This Court has held that a circuit court should dismiss an action pursuant to West Virginia Rule of Civil Procedure 12(b)(6) when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines v. Hampshire County Comm'n*, 216 W. Va. 499, 607 S.E.2d 828, Syl. Pt. 2 (2004) (*per curiam*). Accordingly, a motion to dismiss enables a court to weed out unfounded claims. *See Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104 (1996).

The United States Supreme Court recently abrogated *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), which first established the "no set of facts" standard referred to on page thirteen of the Appellants' Brief. In *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), consumers brought a putative class action against local exchange carriers alleging an antitrust conspiracy. The district court dismissed the complaint for failure to state a claim upon which relief may be granted, and the court of appeals reversed. The Supreme Court held,

*inter alia*, that a dismissal for failure to state a claim upon which relief may be granted *does not* require appearance beyond a doubt, that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. The Supreme Court reasoned as follows:

> . . . *Conley's* "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.

127 S. Ct. at 1969.

In addition, Appellants' claim of fraud must be pled with particularity in accordance with West Virginia Rule of Civil Procedure 9(b). Professor Cleckley and Justice Davis have outlined the specific matters courts look for in assessing whether claims have been pled with particularity as follows:

> (1) identity of person making misrepresentation, (2) time, place and content of misrepresentation, (3) the fraudulent scheme, (4) fraudulent intent of defendant, (5) method by which misrepresentation was communicated to plaintiff, and (6) injury resulting from the fraud.

Franklin J. Cleckley, Robin J. Davis, *et al.*, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 9(b)[2][a].

Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516, Syl. Pt. 2 (1995).

## VI. DISCUSSION

The Circuit Court of Harrison County properly dismissed the claims in the complaint filed by Appellees Elizabeth A. Sedlock and Jason Banish against Ms. Felton, Ms. Hollandsworth and Double H. Realty pursuant to West Virginia Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Appellants can prove no set of facts in support of their claims against Ms. Felton, Ms. Hollandsworth and Double H Realty for breach of contract, negligence and fraud, which would entitle them to relief.

Manifestly, the claims against Ms. Felton, Ms. Hollandsworth and Double H Realty do not meet the pleading requirements of the West Virginia Rules of Civil Procedure. The complaint does not contain a "short and plain statement of the claim" showing that Appellants are entitled to relief as required by West Virginia Rule of Civil Procedure 8. In addition, the claim for fraud is not pled with particularity as required by West Virginia Rule of Civil Procedure 9(b).

The circuit court properly weeded out Appellants' unfounded claims, which arise in connection with the events surrounding the sale of Sedlock's property at 601 Indiana Avenue, Nutter Fort, WV 26301. The circuit court correctly held as a matter of law that there is no duty placed on a real estate salesperson to anticipate a breach of contract and to protect a buyer and/or seller from such breach. In addition, West Virginia Code Section 30-40-26(f) does not require a real estate salesperson to place any requested terms or conditions in a real estate contract. Moreover, the parties to a real estate contract have a duty to read the contract and know its contents before signing. Each of these issues will be addressed in turn.

Romano had been very cooperative with Appellants up until his decision not to sell the house on August 17, 2004 and that rather, it was Mrs. Romano, the source of the information regarding Mr. Romano's prior breach, who had been very vocal regarding her unwillingness to sell her house. No evidence, besides a prior breach of contract, existed that would suggest Mr. Romano intended to breach the contract between him, Mrs. Romano, and Appellants. A prior breach of contract by an individual does not place upon a real estate salesperson a duty to anticipate or predict another breach of contract by that same individual. One breach is not indicative of another.

Consequently, the circuit court's conclusions of law numbered 1 and 7 that no duty is placed upon a real estate salesperson to anticipate a breach of contract and to protect a buyer and/or seller from such breach is plainly right and should not be disturbed by this Court.

### B. West Virginia Code Section 30-40-26(f) Did Not Place a Duty on Ms. Felton, Ms. Hollandsworth, or Double H. Realty to Include Said Term And/or Condition in the July 5, 2004 Contract.

Appellants in an attempt to save their Complaint, allege that Ms. Felton, Ms. Hollandsworth, and Double H. Realty violated West Virginia Code Section 30-40-26(f) by failing to "make certain that all the terms and conditions of a real estate transaction [were] contained in [the] contract prepared by the licensee." *See* W. Va. Code § 30-40-26(f) (2007). Appellants offer no evidence to demonstrate how this section of the West Virginia Code extends to the contingency clause that they claim they believed was included in the July 5, 2004 contract or how this section places a duty on Ms. Felton to include the contingency in the July 5, 2004 contract. Rather, they simply make the assertion that because Ms. Felton had previously completed the "additional terms and conditions" section in the other real estate contracts, she was capable of completing that section in the July 5, 2004 contract. In making this allegation, Appellants overlook the fact that they had located

### A. West Virginia Law Does Not Impose on Real Estate Salespersons a Duty to Anticipate a Breach of a Real Estate Contract and Subsequently Take Steps To Protect His or Her Customer from Such Breach.

"The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law." Syl. Pt. 4, *Strahin v. Cleavenger*, 216 W. Va. 175, 603 S.E.2d 197 (2004) (citing Syl. Pt. 5, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000)). Here, Appellants are attempting to impose on real estate salespersons a duty to anticipate a breach of contract and provide for protection accordingly in a real estate purchase agreement. To hold Ms. Felton, Ms. Hollandsworth and Double H. Realty liable for the Romanos' breach of contract would place a duty upon real estate salespersons higher than the duty placed upon even a lawyer. Because parties generally do not enter into contracts for the sole purpose of later breaching them, such a duty would be impossible to fulfill. Ms. Felton drafted the contract with the terms she believed necessary to complete the sale of real estate.

The Romanos' breach of contract was not foreseeable to Ms. Felton, Ms. Hollandsworth or Double H. Realty as the Romanos had listed their house for sale and had signed an agreement for the sell of their house to Appellants. The simple fact that Ms. Romano allegedly reported to Sedlock that Mr. Romano had previously backed out of a sale of 339 Worley Avenue, does not make it foreseeable that he would breach another contract for the sale of 339 Worley Avenue. After all, according to Appellants' complaint, there was never any communication by Mr. Romano to Appellants that he would breach the contract and refuse to sell the house at 339 Worley Avenue. It was not until August 17, 2004 that Mr. Romano, for the first time, stated that he would not sell his house to Appellants. As indicated by the allegations contained in Appellants' complaint, Mr.

acceptable housing and that the language they now claim they sought inclusion of in the July 5, 2004 contact would have created a system of impossible contingencies.

### 1. Appellants Had Located Acceptable Housing.

The contingency clause was no longer a term and/or condition for the sale of Sedlock's house. Appellants conveniently ignore the fact that they had located "acceptable housing" and contracted to purchase it. As a result, West Virginia Code Section 30-40-26(f) placed no duty on Ms. Felton, Ms. Hollandsworth and Double H. Realty to ensure its inclusion in the contract.

On appeal, Appellants attempt to re-write history so that their Complaint can survive the circuit court's dismissal of their action. Appellants claim that the contract "was contingent upon Elizabeth Sedlock 'buying' a home, as set forth in paragraph 16 of the complaint." As a result, Appellants' argue that the circuit court's third and fourth findings of fact are erroneous because they ignore this fact. However, Appellants' argument is without merit. Appellants' Complaint alleges the following:

> 7. The "Contract for Sale and Purchase" dated March 29, 2004, that was executed by Joann E. Moyle and Thomas L. Moyle with Marsha Ann Felton on behalf of Jean Hollandsworth and Double H. Realty, Inc., the selling company, and Elizabeth A. Sedlock with Marsha Ann Felton on behalf of Jean Hollandsworth and Double H. Realty, Inc., the listing company, provided in part that it was "(c)ontingent in part upon seller locating acceptable housing on or before June 15, 2004."
>
> 8. Elizabeth A. Sedlock was unable to locate acceptable housing on or before June 15, 2004.
>
> 16. On June 26, 2004, Elizabeth A. Sedlock reminded Marsha Ann Felton on behalf of Jean Hollandsworth and Double H. Realty, Inc., that any sale of 601 Indiana Avenue, Nutter Fort, WV 26301, was contingent upon her buying a home, **as was specified in the "Contract for Sale and Purchase" dated March 29, 2004, that was executed by Joann E. Moyle and Thomas L. Moyle . . . ."**

*See* Compl. (Emphasis added). The plain language of Appellants' Complaint states that to the extent

Sedlock to close on the sale of her house located on Indiana Avenue before she could purchase the Worley Avenue house. The contract dated June 26, 2004 and entered into by Appellants for the purchase of the Worley Avenue house expressly conditioned the sale upon "buyers closing on the sale of their house at 601 Indiana Ave., Nutter Fort, WV 26301 prior to the closing date on 339 Worley Ave., Clarksburg, WV 26301," a common provision found in most real estate contracts when the party purchasing a new house has an outstanding mortgage on the house he or she currently owns. (*See* Exhibit 6 attached to Plaintiffs' Compl., which was incorporated into the Complaint by reference, as if fully set forth; *See* Ex. 2, attached to "Memorandum in Support of Defendants' Marsha Ann Felton, Double H. Realty, Inc., Jean Hollandsworth Motion to Dismiss.") Thus, in order for Appellants to sell their house to the Moyles, Appellants would have needed to close on the Worley Avenue house first, and for the Appellants to have purchased the Romanos' house, Sedlock would have needed to close on the sale of her house to the Moyles first. Consequently if the contingency clause would have been included in the July 5, 2004, contract, and had the effect Appellants allege it would have had, then the sale/purchase of the Indiana Avenue house would have been conditioned upon the sale/purchase of the Worley Avenue house. As a result, Appellants' alleged request was an impossible one that would have prevented the selling of both houses.

Furthermore, Appellants would not have been able to obtain the financing necessary to purchase the Worley Avenue house, if Sedlock failed to sell the Indiana Avenue house before closing on the Romanos' house. Correspondence from lending institutions indicated that Sedlock was required to sell the Indiana Avenue house before she could purchase the Worley Avenue house as that was the only possible way in which she and Mr. Banish could obtain the funding needed to close on the Worley Avenue house. (*See* Exhibit 3, attached to "Memorandum in Support of Defendants'

that Appellants wanted a clause included in the contract for the sale of 601 Indiana Avenue, Appellants approved of and sought the inclusion of the same contingency that had been included in the March 29, 2004 contract. This language conditioned the sale of the Indiana Avenue house upon seller "*locating* acceptable housing." Appellants did not allege nor have they argued the contingency included in the March 29, 2004 contract was not what they wanted.

Because Appellants had already "located" acceptable housing prior to entering into the July 5, 2004 contract with the Moyles the contingency was no longer a term or condition of that contract. Ms. Felton, Ms. Hollandsworth and Double H. Realty had no duty under West Virginia Code Section 30-40-26(f) to include it in the July 5, 2004 contract.

### 2. Inclusion of A Clause That Made The July 5, 2004 Contract Contingent Upon "Buying" Acceptable Housing Was a Legal Impossibility.

Appellants would like to lead this court to believe that under Section 30-40-26(f) of the West Virginia Code, it was the intent of the legislature to provide the seller of a house with the right to obligate a real estate salesperson to place any term or condition in a real estate contract, regardless of how impossible that term or condition may be. However, it is unlikely that the West Virginia Legislature intended to grant the seller of a house such authority.

Appellants are attempting to assign a different meaning to the language that they clearly approved of as written in the March 29, 2004 contract and that they allegedly sought to include in the July 5, 2004 contract. Appellants now claim that the contract "was contingent upon Elizabeth Sedlock 'buying' a home. However, inclusion of a clause that made the contract for the sale of 601 Indiana Avenue contingent on Appellants "buying" acceptable housing is a legal impossibility. Appellants' contract with the Romanos to purchase the house at 339 Worley Avenue required

Marsha Ann Felton, Double H. Realty, Inc., Jean Hollandsworth Motion to Dismiss.")

Both parties to a real estate contract, as with any other contract, are obligated to enter such contract with the good faith belief and intent to fulfill that contract. *See* Restatement (Second) of Contracts § 205 (1981). Appellants could not have had Ms. Felton nor expected her to draft the July 5, 2004 contract with such a contingency clause included in it and then entered into that contract in good faith with the intent to fulfill the contract because the clause would have defeated both real estate sales contracts.

Appellants reading of West Virginia Code Section 30-40-26(f) would allow them to defeat two real estate sales contracts by creating a system of impossible contingencies. Also, it would give any individual selling real estate full authority to require a real estate salesperson to draft an illusory contract in which an individual would promise to sell his or her house when, and if, she decided to sell it. Granting an individual such authority would make virtually all real estate sales contract unenforceable because all buyers, looking to sell their current house, would want the absolute protection sought by Appellants, which would give them the right to pull out of a legally binding contract for the sale of their current house, if for some reason a problem arose with the house they, themselves, had contracted to purchase. Real estate contracts would be nothing more than illusory promises and buyers and sellers could never be certain that they would receive the benefit of their bargain. It is unlikely that it was the intent of the West Virginia legislature to grant such authority to buyers and sellers of real estate or to render real estate contracts obsolete and unenforceable.

Also, in furtherance of their attempt to cloud the circuit court's decision, Appellants, in combination with their argument that Ms. Felton violated West Virginia Code Section 30-40-26(f), Appellants also now argue that Ms. Felton violated subsection (d) of West Virginia Code Section

30-40-26. However, this Court should refuse to consider this argument for two reasons. First, Appellants did not raise this issue in the trial court and, therefore, have waived it. The West Virginia Supreme Court of Appeals has held that issues not raised in the trial court and first raised on appeal are considered waived. *Roberts v. Stevens Clinic Hospital, Inc.*, 176 W. Va. 492, 345 S.E.2d 791, 798-99 (1986); *Bell v. West*, 168 W. Va. 391, 397 S.E.2d 885, 888 (1981). Here, Appellants made no mention of any violation of West Virginia Code Section 30-40-26(d) by Ms. Felton to the trial court. They cannot now raise the issue on appeal. Second, any argument advanced by Appellants in relation to an alleged violation of West Virginia Code Section 30-40-26(d) was already stricken by this Court when it denied Appellants' motion to amend their complaint on October 27, 2007. Accordingly, this Court should not consider this argument striking the portions of pages 20 and 21 of Appellants' Brief that contain the argument.

Ms. Felton, Ms. Hollandsworth and Double H. Realty did not violate Section 30-40-26 of the West Virginia Code because they owed no duty to Appellants to include in the July 5, 2004 contract a contingency clause that had already been fulfilled and that would serve to defeat multiple contracts. Accordingly, the circuit court's conclusions of law numbered 4, 5 and 6, which set forth this principle of West Virginia law are plainly correct and should not be disturbed by this Court.

### C. Appellants Had a Duty to Read the Draft Contract to Ensure its Accuracy in Representing the Terms of the Contract.

West Virginia law places a duty upon parties to a contract to read the contract before signing and entering into it. The West Virginia Supreme Court of Appeals has recognized that any individual who signs a contract before first reading it does so at his or her own peril. Accordingly, to the extent that a term Appellants wanted included in the contract, was not in fact included, this is the result of Appellants own negligence. Negligence for which Ms. Felton, Ms. Hollandsworth

and Double H. Realty cannot be held responsible.

### 1. Sedlock Read and Signed the Contract as Drafted.

West Virginia law clearly states that a party to a contract who signs a contract without first reading it does so at his or her own peril. *Reddy v. Community Health Foundation of Man*, 171 W. Va. 368, 373, 298 S.E.2d 906, 910 (1982). The West Virginia Supreme Court of Appeals has held that "failure to read a contract before signing it does not excuse a person from being bound by its terms." *Id.* One of the primary purposes of reducing contracts to writing is to eliminate subsequent arguments concerning the terms of an agreement. *Id.* Accordingly, when an individual enters into a contract freely, knowingly, and in good faith, he or she has a duty to read the contract to ensure its accuracy in representing the terms of the agreement. *See id.*

Parties to real estate sales contracts have a duty to read and know what is in the documents. *See Southern v. Sine*, 95 W. Va. 634, 643, 123 S.E. 436, 439 (1924); *See also DSP Venture Group, Inc. v. Allen*, 830 A.2d 850, 854 (D.C. 2003) ("We have ... consistently adhered to a 'general rule that one who signs a contract has a duty to read it and is obligated according to its terms.'") (citation omitted); *Snyder v. Belmont Homes, Inc.*, 899 So. 2d 57, 61 (La.App. 1 Cir. Feb. 16, 2005) (citing *Washington Mutual Finance Group, LLC v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004)) ("Under Mississippi law courts have consistently held that parties have an affirmative duty to read the contract and are charged with knowing the contents of any document executed."); *Smith v. Smith*, 820 So. 2d 64, 73 -74 (Ala. 2001) (citing *Brushwitz v. Ezell*, 757 So. 2d 423, 430 (Ala. 2000)) (As this Court has recently stated: "A person has a duty to read the documents related to a particular transaction."); *Ursini v. Goldman,* 173 A. 789 (Conn. 1934) ("The general rule is that where a person of mature years and who can read and write, signs or accepts a formal written contract affecting his

pecuniary interests, it is his duty to read it and notice of its contents will be imputed to him if he negligently fails to do so . . . .").

For example, in *Southern v. Sine*, the West Virginia Supreme Court of Appeals held that parties to a deed have a duty to read and know what is in the deed and that if they fail to do so, it is clearly their "fault and negligence." *Id.* The practice of real estate brokerage, which includes acting in the capacity of a real estate salesperson, does not include the activities normally performed by a lawyer. W. Va. Code §30-40-5(a)-(b) (2007). Thus, parties to real estate sales contracts must not rely on real estate salesperson for legal advice. Rather, to ensure that contract terms accomplish his or her goals, a party must first read the contract, and, if he or she is still uncertain, seek assistance from a lawyer.

Appellants claim that the Circuit Court committed reversible error by failing to acknowledge their claim for fraud on the grounds that Ms. Felton allegedly "represented the contingency provisions were in the purchase offer agreement. . . ." Appellants' assignment of error is erroneous. Although Sedlock and Mr. Banish alleged fraud in their Complaint, they also attached and incorporated into their Complaint, as if fully set forth in the Complaint, the July 5, 2004 contract for the sale of the Indiana Avenue house. *See* Plaintiffs' Compl. at ¶ 20 (*See* Exhibit 8, which was incorporated into the Complaint by reference, as if it had been fully set forth). The plain text of the "Contract for Sale and Purchase" of the Indiana Avenue house sets forth Appellants' breach of their own duty to read the contract, nullifying any cause of action they might have of fraud. The July 5, 2004 contract was a short document that included on page one, paragraph numbered twelve, which was titled "ADDITIONAL TERMS AND CONDITIONS." (*See* Ex. 8, attached to Plaintiffs' Compl., which was incorporated into the Complaint by reference, as if fully set forth; *See* Ex. 1,

contingency clause and cannot be held liable for any claim of breach of contract, negligence or fraud with regard to the contingency clause. A duty must exist before liability can attach. Here, the only duty that existed was the duty of Sedlock to read the contract before signing it.

Appellants wrongfully rely on Syllabus Point 1of *Cardinal State Bank, Nat. Ass'n v. Crook*, in an attempt to defeat the representations made by Sedlock in the contract. 184 W. Va. 152, 399 S.E.2d 863 (1990). Syllabus Point 1 of *Cardinal State Bank* allows the introduction of

> extrinsic evidence of statements and declarations of the **parties to an unambiguous written contract** occurring contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain the terms of such contract, in the absence of a showing of illegality, fraud, duress, mistake or insufficiency of consideration.

184 W. Va. 152, 399 S.E.2d 863 (emphasis added). Plaintiffs seek to rely on *Cardinal State Bank* to introduce an alleged statement by Ms. Felton to Sedlock that she new that the contingencies were to have been in the purchase offer agreement of July 5, 2004. Ms. Felton was not a party to the unambiguous written contract dated July 5, 2004. The contract was between Sedlock and the Moyles. No statement allegedly made by Ms. Felton would qualify under the exception Appellants cite to in their brief. The same is true for Appellants allegation that there was some "mutual mistake of fact" between Elizabeth Sedlock and Marsha Ann Felton." Ms. Felton was not a party to the contract. Appellants fail to articulate any contract - oral or written - that Ms. Felton was a party to and could have breached.

### 2. Sedlock Was Not Excused of Her Duty to Read the Contract.

In a case very similar to this one, the Court of Appeals of Georgia held that a seller of real property is not relieved of his or her duty to read sales agreements by virtue of reliance on a fiduciary relationship with the drafting real estate agency. *Rhodes v. Perimeter Properties, Inc.*, 369 S.E.2d

attached to "Memorandum in Support of Defendants' Marsha Ann Felton, Double H. Realty, Inc., Jean Hollandsworth Motion to Dismiss."). Sedlock initialed page one of the "Contract for Sale and Purchase" indicating that she, as the "Seller," had read the page. *Id.* Also, Sedlock initialed page two of the "Contract for Sale and Purchase" at paragraph numbered 22, which reads: "Seller acknowledges that he/she has read and understand the provisions of this agreement and agrees to sell herein described property at the price, terms, and conditions set forth. Seller acknowledges receipt of copy of contract." *Id.* This was after Sedlock initialed next to the word "No" contained in paragraph numbered 21, which asks, "Are you, as Seller, relying upon any oral statements or representations made by the Purchaser, a real estate broker, or agent that are not in this contract." *Id.* Evidenced by the contract itself, Sedlock acknowledges that she read the contract and to date, she has never indicated otherwise.

Sedlock viewed the selling of her house before "locating acceptable housing" as a risk to herself. Accordingly, ensuring inclusion of this clause into the "Contract for Sale and Purchase" should have been the primary focus of Appellants' meetings with Ms. Felton as well as at the signing of the document on July 5, 2004. Sedlock, when signing the contact acknowledged that she, herself, had *read* it, agreed to sell her house pursuant to the conditions included in it, and that she *was not relying on any representations that were not included in the contract.* Whether Sedlock inquired about the contingency's absence or inclusion is not critical to this court's decision nor was it critical to the circuit court's decision to grant the motion to dismiss because Sedlock read the contract. In fact, she had an obligation to read the contract and make changes as she deemed necessary. If she was uncertain as to the legally binding effects of the contract or had any other legal concerns she could have consulted a lawyer. Ms. Felton, however, had no duty to Appellants regarding the

332, 333 (GA.App.1988); *see also Morrison v. Roberts*, 23 S.E.2d 164 (Ga. 1942). If Appellants suffered any harm here, it is because Appellants read and accepted the contract as drafted, rather than making changes to the contract.

If Appellants wanted something outside of a normal real estate sales contract, they could have sought the advice of an attorney. Sedlock's failure to make any changes to the contract or seek legal advice waives any allegations she may have that the contract did not represent the agreement she wanted and believed she was entering into. As noted previously, Petitioner Sedlock initialed and signed the July 5, 2004, contract acknowledging not only that she read and understood the provisions and agreed to sell her house at the price, terms, and conditions set forth, but that she was not relying upon any oral statements or representations made by the Purchaser, a real estate broker, or agent that were not in the contract.

Appellants' attempt to rely on dicta in *Rhodes* to establish an exception to Georgia's general rule that "those who can read must read and that failure to read a document on the basis solely of reliance upon the advise of the real estate salesperson does not relieve an individual of his or her "ordinary duty" to read the sales agreement." *See id.* at 333. Appellants rely on a long quote for which the Court specifically notes that it is relying on "assumptions." *Id.* The Court also notes that the facts it sets forth in its discussion are not the facts as they exist in the case for which it are asked to review. Accordingly, the Court only offers speculation as to how it might rule, if the case had a different set of facts. The West Virginia Supreme Court of Appeals should not be influenced by the dicta contained in the Georgia opinion. West Virginia has not carved out any similar exception, and to the extent that the West Virginia Supreme Court of Appeals has spoken on this issue, it has specifically stated that one who fails to read a contract **does so at his or her own peril.**

The circuit court's conclusions of law numbered 2 and 3 are plainly right. They set forth principles supported by West Virginia law, which place a duty upon parties to a real estate contract to read the contract and know what is in the document before they sign. Applying these principles to the case at hand, the circuit court correctly concluded that Plaintiffs failed to state a claim upon which relief could be granted.

## VII. CONCLUSION

For all of the foregoing reasons, this Court should affirm the order of the Circuit Court of Harrison County, which granted the motion to dismiss filed by Marsha Ann Felton, Jean Hollandsworth and Double H. Realty, Inc.

Dated this 14th day of November, 2007.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2007, I caused to be served the foregoing Brief of Appellees on counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

LaVerne Sweeney, Esquire
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Amy M Smith /tas